

CHAPTER IV. FORWARDING AND DISPOSITION OF CHARGES

Rule 401. Forwarding and disposition of charges in general

(a) *Who may dispose of charges.* Only persons authorized to convene courts-martial or to administer nonjudicial punishment under Article 15 may dispose of charges. A superior competent authority may withhold the authority of a subordinate to dispose of charges in individual cases, types of cases, or generally.

Discussion

See R.C.M. 504 as to who may convene courts-martial and paragraph 2 of Part V as to who may administer nonjudicial punishment. If the power to convene courts-martial and to administer nonjudicial punishment has been withheld, a commander may not dispose of charges under this rule.

Ordinarily charges should be forwarded to the accused's immediate commander for initial consideration as to disposition. Each commander has independent discretion to determine how charges will be disposed of, except to the extent that the commander's authority has been withheld by superior competent authority. See also R.C.M. 104.

Each commander who forwards or disposes of charges may make minor changes therein. See R.C.M. 603(a) and (b). If major changes are necessary, the affected charge should be preferred anew. See R.C.M. 603(d). If a commander is an accuser (see Article 1(9); 307(a)) that commander is ineligible to refer such charges to a general or special court-martial. See R.C.M. 601(c). However, see R.C.M. 1302(b) (accuser may refer charges to a summary court-martial).

(b) *Prompt determination.* When a commander with authority to dispose of charges receives charges, that commander shall promptly determine what disposition will be made in the interest of justice and discipline.

Discussion

In determining what level of disposition is appropriate, see R.C.M. 306(b) and (c). When charges are brought against two or more accused with a view to a joint or common trial, see R.C.M. 307(c)(5); 601(e)(3). If it appears that the accused may lack mental capacity to stand trial or may not have been mentally responsible at the times of the offenses, see R.C.M. 706; 909; 916(k).

As to the rules concerning speedy trial, see R.C.M. 707. See also Articles 10; 30; 33; 98.

Before determining an appropriate disposition, a commander who receives charges should ensure that: (1) a preliminary inquiry under R.C.M. 303 has been conducted; (2) the accused has been

notified in accordance with R.C.M. 308; and (3) the charges are in proper form.

(c) *How charges may be disposed of.* Unless the authority to do so has been limited or withheld by superior competent authority, a commander may dispose of charges by dismissing any or all of them, forwarding any or all of them to another commander for disposition, or referring any or all of them to a court-martial which the commander is empowered to convene. Charges should be disposed of in accordance with the policy in R.C.M. 306(b).

Discussion

A commander may dispose of charges individually or collectively. If charges are referred to a court-martial, ordinarily all known charges should be referred to a single court-martial.

See Appendix 3 when the charges may involve matters in which the Department of Justice has an interest.

(1) *Dismissal.* When a commander dismisses charges further disposition under R.C.M. 306(c) of the offenses is not barred.

Discussion

Charges are ordinarily dismissed by lining out and initialing the deleted specifications or otherwise recording that a specification is dismissed. When all charges and specifications are dismissed, the accuser and the accused ordinarily should be informed.

A charge should be dismissed when it fails to state an offense, when it is unsupported by available evidence, or when there are other sound reasons why trial by court-martial is not appropriate. Before dismissing charges because trial would be detrimental to the prosecution of a war or harmful to national security, see R.C.M. 401(d); 407(b).

If the accused has already refused nonjudicial punishment, charges should not be dismissed with a view to offering nonjudicial punishment unless the accused has indicated willingness to accept nonjudicial punishment if again offered. The decision whether to dismiss charges in such circumstances is within the sole discretion of the commander concerned.

Charges may be amended in accordance with R.C.M. 603.

It is appropriate to dismiss a charge and prefer another charge anew when, for example, the original charge failed to state an offense, or was so defective that a major amendment was required (see R.C.M. 603(d)), or did not adequately reflect the nature or seriousness of the offense.

See R.C.M. 907(b)(2)(C) concerning the effect of dismissing charges after the court-martial has begun.

(2) *Forwarding charges.*

(A) *Forwarding to a superior commander.* When charges are forwarded to a superior commander for disposition, the forwarding commander shall make a personal recommendation as to disposition. If the forwarding commander is disqualified from acting as convening authority in the case, the basis for the disqualification shall be noted.

Discussion

A commander's recommendation is within that commander's sole discretion. No authority may direct a commander to make a specific recommendation as to disposition.

When charges are forwarded to a superior commander with a view to trial by general or special court-martial, they should be forwarded by a letter of transmittal or indorsement. To the extent practicable without unduly delaying forwarding the charges, the letter should include or carry as inclosures: a summary of the available evidence relating to each offense; evidence of previous convictions and nonjudicial punishments of the accused; an indication that the accused has been offered and refused nonjudicial punishment, if applicable; and any other matters required by superior authority or deemed appropriate by the forwarding commander. Other matters which may be appropriate include information concerning the accused's background and character of military service, and a description of any unusual circumstances in the case. The summary of evidence should include available witness statements, documentary evidence, and exhibits. When practicable, copies of signed statements of the witnesses should be forwarded, as should copies of any investigative or laboratory reports. Forwarding charges should not be delayed, however, solely to obtain such statements or reports when it otherwise appears that sufficient evidence to warrant trial is or will be available in time for trial. If because of the bulk of documents or exhibits, it is impracticable to forward them with the letter of transmittal, they should be properly preserved and should be referred to in the letter of transmittal.

When it appears that any witness may not be available for later proceedings in the case or that a deposition may be appropriate, that matter should be brought to the attention of the convening authority promptly and should be noted in the letter of transmittal.

When charges are forwarded with a view to disposition other than trial by general or special court-martial, they should be accompanied by sufficient information to enable the authority receiving them to dispose of them without further investigation.

(B) *Other cases.* When charges are forwarded to a commander who is not a superior of the forwarding commander, no recommendation as to disposition may be made.

Discussion

Except when directed to forward charges, a subordinate commander may not be required to take any specific action to dispose of charges. *See* R.C.M. 104. *See also* paragraph 1d(2) of Part V. When appropriate, charges may be sent or returned to a subordinate commander for compliance with procedural requirements. *See, for example, R.C.M. 303 (preliminary inquiry); R.C.M. 308 (notification to accused of charges).*

(3) *Referral of charges.* *See* R.C.M. 403, 404, 407, 601.

(d) *National security matters.* If a commander who is not a general court-martial convening authority finds that the charges warrant trial by court-martial but believes that trial would probably be detrimental to the prosecution of a war or harmful to national security, the charges shall be forwarded to the officer exercising general court-martial convening authority.

Discussion

See R.C.M. 407(b).